FILE COPY

APR 5 19

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1929

No. 338

FRANK H. DOHANY,
Plaintiff and Appellant,
v.
FRANK F. ROGERS, et al,
Defendants and Appellees.

## REPLY BRIEF FOR DEFENDANT, FRANK F. ROGERS

WILBER M. BRUCKER,
Attorney General of Michigan,

KIT F. CLARDY,
Assistant Attorney General of Michigan,

Attorneys for Defendant,
FRANK F. ROGERS.

Business Address:
Capitol,
Lansing, Michigan.

FRANKLIN DENLINGER COMPANY, PRINTERS AND BINDERS, LANSING

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1929

No. 338

FRANK H. DOHANY,
Plaintiff and Appellant,
v.
FRANK F. ROGERS, et al,
Defendants and Appellees.

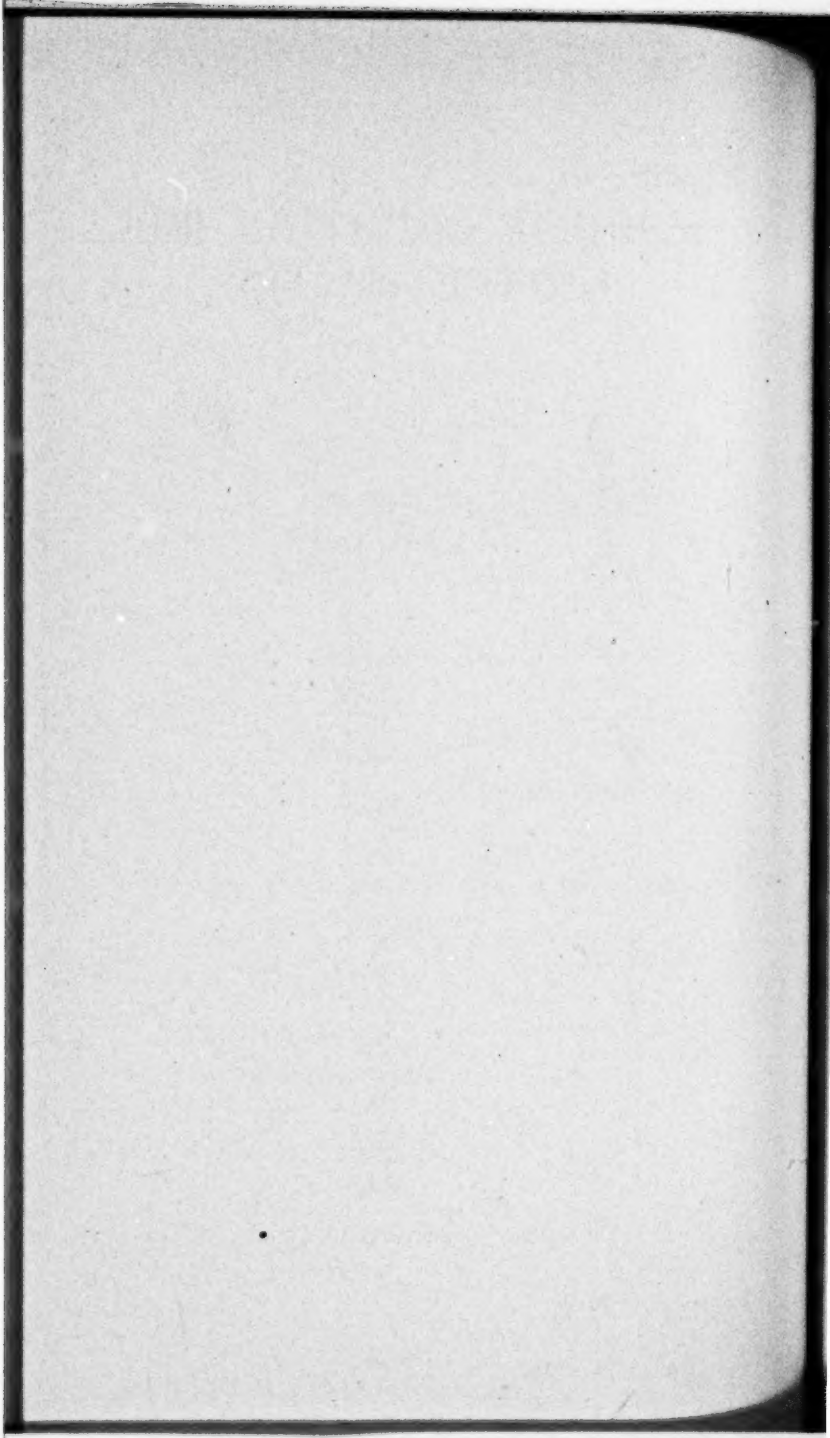
## REPLY BRIEF FOR DEFENDANT, FRANK F. ROGERS

WILBER M. BRUCKER,
Attorney General of Michigan,

KIT F. CLARDY,
Assistant Attorney General of Michigan,

Attorneys for Defendant,
FRANK F. ROGERS.

Business Address:
Capitol,
Lansing, Michigan.



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1929

No. 338

FRANK H. DOHANY,
Plaintiff and Appellant,

vs.

FRANK F. ROGERS, State Highway Commissioner of the State of Michigan; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation, and THE H. W. NELSON COMPANY, of Chicago, Illinois, a foreign corporation,
Defendants and Appellees.

## REPLY BRIEF FOR DEFENDANT FRANK F. ROGERS

The appellant was granted permission to file a reply brief. We did not assume that any further word would be required from the State of Michigan. Certain misstatements in the appellant's reply brief however should not be allowed to go unchallenged.

On page three of his reply brief the appellant sets out what purports to be a copy of certain portions of the State Highway Commissioner's determination of necessity. He then proceeds to argue that that part of the determination which he quotes establishes that the Highway Commissioner off-set benefits in making his estimate of damages. The appellant says:

> "Not only do we find the State Highway Commissioner deducted benefits when determining the damages which in his opinion should be paid to appellant for the taking of his property, * * *"

On page four his brief reads:

> "So here we find, notwithstanding the reply of Mr. Clardy to the interrogations of this court that the State Highway Commissioner did deduct benefits from the damages which in his opinion should be paid to appellant * * *"

The appellant in making these statements has, it will be observed, based his argument entirely upon an assumption which he makes from the language used by the State Highway Commissioner in naming the amount of damages which he believed this appellant should receive. *In making this assumption and in presenting this argument to the court, the appellant has apparently deliberately withheld from the court information set up in the commissioner's determination of necessity, which directly contradicts his statement and argument. He has quoted only part of the commissioner's determination of necessity and has omitted a statement which directly contradicts all the argument he has builded upon this omission.* The State Highway Commissioner's determination of necessity was produced before the lower court in full. In compiling the record

naturally only certain parts were taken out by the appellant for the sake of shortening the record. We did not deem it advisable to include any further portion because we felt sure that there would be no misrepresentation arising out of any omission. This document is required to be and is in fact officially on file in the office of the register of deeds for the County of Oakland, State of Michigan; in the office of the secretary of state; in the office of the state treasurer; and in the office of the state highway commissioner for the state of Michigan. A full and complete copy has been and is in the possession of the appellant. The determination after setting forth a description of the appellant's property reads as follows:

"Owner: Frank H. Dohany,
Damages: $23,562.50
Mortgagee: American State Bank, Detroit, Michigan.
No benefits deducted."

The next page in the Commissioner's determination sets forth a description of another parcel of property belonging to this appellant and involved in this proceeding and concludes as follows:

"Owner: Frank H. Dohany,
Damages: $1,137.50
No benefits deducted."

The appellant has omitted and left out the last two lines in one instance and the last line in the other in which the highway commissioner has emphatically set out that he had not deducted benefits. This determination was

made before the Supreme Court had determined that benefits could not be deducted. This finding was part of the same determination upon which an appeal was taken in the case of Fitzsimons and Galvin Inc. v. Rogers, 243 Mich. 649. It would not be of importance except for the fact that it is a misrepresentation of the actual facts as shown by the determination itself on file in the many offices mentioned above. The balance of his argument with regard to the proof we are putting in before the three commissioners appointed under the statute to fix damages is upon a parity with the argument we have just discussed. The State is not deducting benefits and has expressly requested the commissioners to not consider them in any of the testimony the State may present. We are endeavoring to comply with our court's determination in the Fitzsimons and Galvin case.

We pointed out to the court upon argument the distinction between the Johnstone case and the Fitzsimons and Galvin case. No property was being taken in the Johnstone case. There was involved only a question of the violation of certain building restrictions without there being any physical taking or even contact with the property involved. A different rule of damages would necessarily be involved.

The Michigan Supreme Court has said that the measure of damages is the same under either statute. It has ruled that the railway statute is inapplicable because of certain terms regarding action by the board of directors and various other inconsistent provisions. It has said that the highway procedure is fitted to the necessities of the case. It has held the statutes to be equal. The State therefore submits that there is no denial of

the equal protection of the laws and that the ruling of the court below should be sustained.

Respectfully submitted,

WILBER M. BRUCKER,
Attorney General,

KIT F. CLARDY,
Assistant Attorney General,

Attorneys for appellee, Frank F. Rogers.

Dated, Lansing, Michigan,
March 31, 1930.